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1 THE COURT: Okay. Good afternoon, everyone. This is  
2 Judge Kaplan. Thank you for working with the Court on its  
3 calendar issues and accommodating the Court as well as  
4 participating through CourtSolutions.

5 As a reminder, I'll ask that everyone please remain  
6 muted unless you are speaking or need to raise a concern to the  
7 Court. That way, we reduce any negative feedback and have a  
8 proper recording.

9 Kathy, I'm going to ask that you tag this hearing.

10 THE CLERK: Okay, Judge.

11 THE COURT: All right. Thank you.

12 We are here on several Congoleum matters,  
13 specifically a motion to stay docketed at Number 28 in the  
14 adversary proceeding filed on behalf of DVL, a stay pending the  
15 District Court's determination of a withdrawal of the reference  
16 motion. We are also here on a stay filed on behalf of DVL  
17 seeking a stay pending appeal of this Court's prior order  
18 denying DVL the opportunity to intervene in the adversary  
19 proceeding. There's also a -- a continuing adjourned stay  
20 relief motion in the -- with respect to the DVL litigation in  
21 the District Court. And we're also going to discuss as a  
22 pre-hearing conference how we will proceed on the 28th with  
23 respect to the evidentiary hearing on a -- on the proposed  
24 settlement.

25 Let me have appearances now. I'll start asking for

1 appearances by the debtor.

2 MR. USATINE: Good afternoon, Your Honor. Warren  
3 Usatine, Felice Yudkin, Cole Schotz, on behalf of the debtor.

4 THE COURT: All right. Thank you.

5 On behalf of the committee?

6 MR. PROL: Good afternoon, Your Honor. Jeffrey Prol,  
7 Lowenstein Sandler, for the committee.

8 THE COURT: Thank you.

9 On behalf of Simplon?

10 MR. LAWLOR: Good afternoon, Your Honor. James  
11 Lawlor, Wollmuth Maher & Deutsch.

12 THE COURT: Thank you. Good afternoon.

13 On behalf of Bath Iron Works and General Dynamics?

14 MR. STOLZ: Good afternoon, Your Honor. Daniel  
15 Stolz, Wasserman, Jurista & Stolz, local counsel. I'll let my  
16 co-counsel make their appearances, because they will be  
17 primarily arguing today.

18 THE COURT: All right. Thank you.

19 MS. STEEGE: Good afternoon, Your Honor. Catherine  
20 Steege on behalf of Bath Iron Works.

21 THE COURT: Thank you.

22 MR. WADE: Hello, Your Honor. This is Wade Thompson,  
23 also, on behalf of Bath Iron Works.

24 THE COURT: Good afternoon. Thank you.

25 On behalf of --

1 MR. DOORNWEERD: And Mike Doornweerd, Your Honor,  
2 also --

3 THE COURT: Oh, I'm sorry.

4 MR. DOORNWEERD: -- on behalf of Bath -- yeah, Mike  
5 Doornweerd, also on behalf of Bath Iron Works, although  
6 Ms. Steege and Mr. Thompson will be primarily speaking. Thank  
7 you.

8 THE COURT: All right. Thank you.

9 On behalf of DVL?

10 MR. TWARDOWSKI: Anthony Twardowski, Your Honor. And  
11 I'm here with Earl Forte. And Eitan Blanc is also on the line.

12 THE COURT: All right. Thank you, gentlemen.

13 MR. SCHMIDT: And, Your Honor, also --

14 THE COURT: Oh, go ahead.

15 MR. SCHMIDT: Also Paul Schmidt from Post & Schell on  
16 behalf of DVL.

17 THE COURT: All right. I do have noted on --  
18 there's -- there are certain pro hac vice applications that are  
19 pending. For purposes of today's hearing, I am welcoming you  
20 all to New Jersey. We don't need to address the pro hac  
21 issues.

22 On behalf of Occidental?

23 MR. SILBERGLIED: Thank you, Your Honor. It's Russ  
24 Silberglied at Richards, Layton & Finger. I think I'm one of  
25 those pro hac motions that's pending.

1 THE COURT: All right. Thank you.

2 MR. SILVER: And, Your Honor, this is --

3 THE COURT: And -- yes?

4 MR. SILVER: Your Honor, this is Larry Silver of  
5 Langsam Stevens Silver & Hollaender, also pro hac vice.

6 THE COURT: All right. Thank you.

7 On behalf of Liberty Mutual?

8 MR. MILLNER: It's -- good afternoon, Your Honor.  
9 It's Robert Millner on behalf of Liberty Mutual.

10 THE COURT: Good afternoon.

11 And I should not forget the Office of the U.S.  
12 Trustee.

13 MR. SPONDER: Thank you, Your Honor. Good afternoon.  
14 Jeff Sponder from the Office of the United States Trustee.

15 THE COURT: All right. Are there -- have I missed  
16 anyone? Good. Then let's proceed.

17 Does anybody take issue with the matters identified  
18 as being on the docket and on the calendar for today? Do I  
19 have them all?

20 MR. TWARDOWSKI: I think you do, Your Honor.

21 THE COURT: All right. So silence is always good.  
22 All right. Thank you.

23 Then let me -- I'm going to treat the two motions for  
24 seeking the stay, one pending the withdrawal motion -- a  
25 resolution of the withdrawal motion -- withdrawal of the

1 reference and also the stay pending appeal of the Court's prior  
2 order denying DVL the right to intervene, I'm going to treat  
3 them together for argument purposes.

4 I have, at the outset, I guess, some clarifications I  
5 want to make in my own mind as to what's going on in these  
6 matters and also some questions. And then those questions can  
7 lead into the presentation on behalf of DVL first since they  
8 are the movant joined, as they were, I believe, by Occidental.  
9 And let me start with -- and then counsel can correct me if I  
10 err or can expand upon my comments.

11 At issue in the one single count in the adversary  
12 proceeding brought by Bath Iron Works before the Bankruptcy  
13 Court is a single count seeking, in essence, to absolve Bath  
14 Iron Works of liability, looking to -- for environmental  
15 liabilities in connection with the District Court action that's  
16 pending. More specifically, the count seeks a declaratory  
17 ruling by this Court that, as a result of the Bankruptcy Court  
18 order approving a sale of the policy -- I believe it was a  
19 Century -- and the confirmation order entered by the District  
20 Court in 2010, there was determinations made by those courts  
21 that Bath Iron Works was not liable for any liabilities, "any"  
22 being the key, arising from the Congoleum floor business or  
23 Resilient Flooring.

24 The proposed settlement that has been reached between  
25 the debtor, the committee in support and Bath Iron Works



1 provides for a withdrawal of a approximately 14 --  
2 14-and-a-half-million-dollar claim by Bath Iron Works, a \$1  
3 million payment. The settlement is bottomed on a requirement  
4 that this Court approve a settlement that includes findings of  
5 facts and conclusions regarding the scope of Bath Iron Works'  
6 liability under the 2010 confirmation order or the potential  
7 liability.

8 In essence, my understanding is that the parties have  
9 agreed to have this Court rule, essentially, on the scope and  
10 parameters of the 2010 confirmation order and the preceding  
11 2006, I believe, sale order. My further understanding is that,  
12 if the Court chooses not to undertake this effort to rule on  
13 the scope of the orders entered in the initial -- the first  
14 bankruptcy of Congoleum or doesn't make the findings sought and  
15 favorable to Bath Iron Works, there will be no settlement.  
16 There will be no payment of the million dollars or withdrawal  
17 of the claim.

18 So my question would be, if I take that route -- and  
19 if I were to not approve the settlement or not make those  
20 findings, then there seems to be little point in Bath Iron  
21 Works continuing the adversary proceeding. It's not going to  
22 get any better for Bath Iron Works than it would at the hearing  
23 on the settlement. And, thus, there would be a termination of  
24 the adversary proceeding. If I approve the settlement, of  
25 course, then DVL and Occidental and others can appeal that

1 ruling and also argue the relevancy or the appropriateness of  
2 my findings in the District Court or any other forum.

3           So -- and -- so I guess my first question directed  
4 towards DVL would be, if the Court doesn't approve the  
5 settlement and -- or doesn't agree to the findings that are  
6 sought, why are you all here today? What's the purpose in --  
7 there won't be an adversary proceeding going forward in either  
8 event. Either it's going to be settled or there really won't  
9 be anything for Bath Iron Works to pursue. So why are we --  
10 why is there a withdrawal of the reference effort, and why is  
11 there an intervention effort?

12           Let me also, before I turn to you, have you also  
13 address another concern I have as -- and -- as part of your  
14 presentation. If I look at -- bear with me -- a chronology of  
15 what's gone on here since mid-October, I look at the fact that  
16 on October 21, DVL filed a motion to intervene. And in their  
17 brief in support of the motion docketed at ECF Number 14 on  
18 pages 2 and 3 and 14 and also in the proposed order, it's  
19 clear -- it's repeated several times -- that DVL seeks to  
20 intervene solely that it might then move the District Court,  
21 pursuant to 28 U.S.C. 157(d), to withdraw the reference of the  
22 adversary proceeding filed by BIW against the debtor.

23           Then on November 10th, I deny the motion to  
24 intervene. And then two weeks later, on November 24th, the  
25 motion to withdraw the reference is filed. So my other

1 question is, what was the purpose in filing the motion to  
2 intervene? If it was only -- if it was necessary to file a  
3 motion to withdraw the reference, then why did -- why was it  
4 simply the next step to file the withdrawal -- the motion to  
5 withdraw the reference in any event? It seems that kind of  
6 ignored my ruling.

7 MR. FORTE: Your Honor --

8 THE COURT: So --

9 MR. FORTE: Okay.

10 THE COURT: -- let me turn to DVL.

11 MR. FORTE: Okay. Your Honor, thank you. First of  
12 all, this is Earl Forte. I want to emphasize the fact that we  
13 are continuing to object to the entry of final orders and  
14 judgments to the Bankruptcy Court. We have to do that, and  
15 that's what we're doing, notwithstanding the procedures we've  
16 been discussing with Bath Iron Works.

17 Since Your Honor denied our motion to intervene, the  
18 settlement motion was filed in the main case. So we renew --  
19 we filed a motion to withdraw the reference, because that was  
20 filed in the main case, and it seeks to settle the adversary.  
21 We filed in the adversary namely as a precautionary matter,  
22 because we're not a plaintiff; we're not a defendant. We  
23 simply could have filed that in the main case, but we elected  
24 to request the right to intervene.

25 We thought that was the more appropriate way to do

1 it, and that's what we did. And then we had to react to the  
2 filing of the settlement motion which we didn't know was coming  
3 until October 13th, I believe. That's the explanation. So  
4 that's the history of that.

5 And I don't -- if the Court has any more questions, I  
6 can certainly answer them. If Your Honor denies the settlement  
7 and doesn't enter all the findings and conclusions, et cetera,  
8 then we'll decide what we're going to do. Obviously, that's a  
9 result that DVL would want.

10 If Your Honor approves the settlement, presumably we  
11 would have some right to appeal. But, of course, the standard  
12 of review would be far more difficult for us. It's a 9019. It  
13 would most likely be reviewed on an abuse of discretion stance.  
14 Over at the District Court where we started all this, the  
15 District Court has addressed these issues previously and could  
16 do it again. If we were unhappy with the result, and we had a  
17 right to appeal, it would be de novo review on issues of law  
18 and clearly erroneous on issues of fact.

19 So we have to think that through in the way we do  
20 things. We weren't intending to make extra work or to ignore  
21 the Court at all in the steps we were taking. So that's an  
22 explanation. I can answer any questions the Court may have  
23 about that.

24 THE COURT: All right. Well, I certainly want to  
25 give you the opportunity to argue the motion or supplement your

1 arguments. Because I have read the papers, including the reply  
2 that was filed yesterday, so I'm cognizant of what's been  
3 argued in the papers.

4 Let me ask this. There is several decisions both  
5 cited by Bath Iron Works and also that the Court has been able  
6 to identify which holds that a non-party to an adversary  
7 proceeding does not have standing to file a motion to withdraw  
8 the reference of that particular proceeding. I know Bath Iron  
9 Works cited to In Re Innovative Commercial Corp. (sic), which  
10 is District of the Virgin Islands. There's FTC vs. American  
11 Institute of Research (sic), 219 B.R. 639.

12 My staff -- my clerk has assisted in identifying  
13 In Re New Energy Corp., 2013 WL 1192774, a Bankruptcy Court  
14 decision from the Northern District of Indiana in 2013. And as  
15 well as Sharifeh vs. Fox, S-H-A-R-I-F-E-H vs. Fox, 2012 WL  
16 469980, Northern District of Illinois, again 2012.

17 And they all stand, and they all cite, the  
18 proposition that a non-party does not have standing to withdraw  
19 the reference. So can you point to me authority specific to an  
20 adversary proceeding where a party that is neither a plaintiff  
21 or a defendant has standing to withdraw the reference? I think  
22 this becomes relevant when I have to make a decision as to --  
23 as -- a ruling on whether or not there's a likelihood of  
24 success on the motion to withdraw the reference.

25 MR. FORTE: Your Honor, could I -- I saw those

1 cites. And I didn't read all the opinions. I'm not going to  
2 say I had a chance to read all of those. I don't think any of  
3 them are binding. I would like an opportunity to brief that  
4 issue more thoroughly specifically. I can do that promptly.

5 But it's difficult to understand that when the  
6 statute says any party has a right to seek withdrawal of any  
7 proceeding. And, in fact, you do see opinions out there where  
8 withdrawal of the reference of adversaries was sought in the  
9 main case. And it's typically where motions to withdraw the  
10 reference are filed.

11 And it strikes me as a difficult position, because if  
12 we had intervened as a plaintiff or defendant in the case, what  
13 we would have heard was we submitted to the claims process and  
14 the Court, and we would have lost our right to have a jury  
15 trial in the District Court. That's exactly what would have  
16 happened. And we can't afford to let that go. We made that  
17 demand three years ago.

18 THE COURT: All right. I'm going to -- obviously --

19 UNIDENTIFIED SPEAKER: And Your Honor --

20 THE COURT: -- allow your adversary to respond, but  
21 why don't you continue in support of your motions.

22 MR. FORTE: Okay. Your Honor, well, first of all, we  
23 are seeking to withdraw -- we're seeking to withdraw two items:  
24 the adversary and the settlement. Okay? The settlement motion  
25 was filed in the main case. We're not seeking to withdraw the

1 entire proceeding. We're not shutting down the whole case as  
2 the debtors have said in their papers.

3 And we're seeking the stay principally under  
4 Bankruptcy Rule 5011(c). Our fallback position, our  
5 alternative position, is a stay pending appeal under Rule 8007.  
6 So we have two bases for that.

7 If Your Honor is familiar with all the briefs, I  
8 won't go over all of them, all those points again. I think we  
9 have here a matter that doesn't involve bankruptcy law. The  
10 issues relating to surplus and its potential for successor  
11 liability exemption is going to be complicated. It's not a  
12 standard application of a known federal statute to a simple set  
13 of facts, and the Court will need to think through what's going  
14 to happen, not only in our case but in the Occidental case, if  
15 these findings and conclusions are entered.

16 They go back to agreements entered into in the 1980s.  
17 There's a discussion about the Century settlement from 2006.  
18 My client wasn't a party to that. The 2010 confirmation order,  
19 as far as we've been able to dig up, that was never noticed to  
20 my -- to our clients. The claims they have weren't known until  
21 2015.

22 We're going to have to weed through all that in the  
23 District Courts if the settlement is approved, and we're going  
24 to have piecemeal litigation in that part of the issues in  
25 dispute in the District Court will be decided in the Bankruptcy

1 Court and sent up and might be subject to appeal, et cetera.  
2 They've been raised and discussed previously. Bath Iron Works  
3 is fully capable of advocating for itself in the District  
4 Court.

5 So it just seems to me that there's no reason not to  
6 let it proceed in the District Court. And we had asked for  
7 relief from the automatic stay to proceed against Bath Iron  
8 Works and any insurance proceeds. We would not attempt to  
9 collect a judgment against the debtor.

10 I also would like to mention a couple of the cases  
11 that were cited in the brief that I -- we didn't address in our  
12 reply that we don't think really apply at all. Bath Iron Works  
13 cited Connie's Trading out of the Southern District of New  
14 York. I just would point out that at least the version of that  
15 that appears on Lexis is the magistrate's recommendation. It's  
16 not a court opinion.

17 And the trustee in that case had brought a fraudulent  
18 transfer action under the provisions of the Bankruptcy Code  
19 and -- about the strong arm powers in Section 548, I believe.  
20 And they were -- the movants were attempting to withdraw the  
21 reference of that. Well, no one's ever going to get that.  
22 That's clearly a bankruptcy claim. And they were seeking to  
23 apply the Wagoner rule and so forth to bar the fraudulent  
24 transfer claim which is also just a deadpan loser. It's  
25 completely inapplicable to the current situation.



1           We have the same situation -- or similar situation  
2 in Hudson Palmer Homes, an EDPA case that was cited by the Bath  
3 Iron Works. And in that, the trustee filed a motion to approve  
4 the settlement under 9019 and then moved to withdraw the  
5 reference of his very own 9019 motion which certainly didn't  
6 seem to make a lot of sense.

7           Lazy Days, which they also cite -- that's a Third  
8 Circuit opinion -- really had to do with Section 350(a) of the  
9 Code and whether the Bankruptcy Court could reopen a case and  
10 whether or not it had given an advisory opinion to a state  
11 court. So there were two Bankruptcy Code issues. We don't  
12 have any Bankruptcy Code issues in the substance of this  
13 settlement.

14           I think the Third Circuit and the Supreme Court say  
15 you look past the labels and ask what is really being done.  
16 And the Court's being asked to adjudicate issues between two  
17 non-debtors in two CERCLA actions in the District Court.  
18 There's no need for it. There's absolutely no reason why this  
19 has to be done in the Bankruptcy Court. It doesn't relate to  
20 the case.

21           And, I think, given the unique nature of the  
22 settlement and, I think, particularly the way the  
23 million-dollar payment is going, Bath Iron Works would normally  
24 negotiate a proof of claim amount of some kind. And the debtor  
25 would agree to pay it. Whatever cents on the dollar would be

1 allowed -- would be paid based on the allowed amount. We have  
2 Bath Iron Works basically paying to get the results it wants  
3 and then not agreeing to pay if it doesn't get the results it  
4 wants.

5 So we are seeking withdrawal of the reference of the  
6 settlement motion as well as the adversary. And, Your Honor, I  
7 understand that it's made unique in that the settlement motion  
8 resolves the adversary.

9 As far as the harms go, you know, that's  
10 well-briefed. There's nothing that the debtor is doing that  
11 couldn't wait. They're liquidating. They have no employees,  
12 They have no operations. They don't have a bank or investors  
13 that are being hurt like they did in Millennium Labs and some  
14 of those other larger cases where there were many, many people  
15 who would have been hurt if the appeal had been granted. We  
16 don't have anything like that here.

17 My client is going to be stuck with a settlement to  
18 undo, possibly in one or two different courts: Occidental in  
19 the Occidental case, DVL in the DVL case. And there's no  
20 reason to do it. I mean, I think Bath Iron Works simply  
21 figures it's the easiest place to go. They can offer some  
22 money. The debtor needs it, I'm sure. That's no reason to  
23 approve it.

24 To the public interest, I think -- I think, you know,  
25 we do have a right to preserve the integrity of the judicial

1 process in the District Court and not have this broken up into  
2 piecemeal litigation and decided in this way. There's no  
3 reason for it.

4 Bath Iron Works' rights are fully protected in the  
5 District Court. This is the second place they've gone outside  
6 the District Court to try to get this resolved. As the Court  
7 knows, they filed in Maine. That got kicked back to New  
8 Jersey.

9 Why is this any different? It doesn't really affect  
10 the estate anymore. They won't get their million dollars, at  
11 least for now. But Bath Iron Works admits in its papers this  
12 can be decided in the District Court. There's nothing core  
13 about this at all. It was the subject of one interlocutory  
14 opinion that's on Lexis already.

15 THE COURT: Counsel, are you there? I'm not hearing  
16 you.

17 MR. FORTE: You're not hearing me?

18 THE COURT: I just --

19 MR. FORTE: Okay. I'm here. I'm --

20 THE COURT: No. You're --

21 MR. FORTE: Your Honor, I'm basically done with my  
22 presentation unless the Court has questions.

23 THE COURT: Not at this juncture. Thank you.

24 Is there anyone who wants to argue in further support  
25 of the movant's position?

1 MR. SILBERGLIED: Yes, Your Honor. Russ Silberglied,  
2 Richards, Layton & Finger on behalf of Occidental. May I be  
3 heard?

4 THE COURT: Yes, please.

5 MR. SILBERGLIED: Thank you very much, Your Honor.  
6 So we did file a joinder in the stay motion which said that it  
7 was in support of the motion to withdraw the reference, and we  
8 were careful to say not with respect to the stay pending appeal  
9 portion, because, obviously, we were not involved in the  
10 adversary proceeding in any way. So that portion is not  
11 applicable to us, but it is a motion to stay in support of  
12 withdrawal of the reference specifically of the 9019 motion.

13 So, Your Honor, with that, our attendance today is  
14 because of our concern over jurisdiction. So as I mentioned at  
15 the last hearing, we neither filed a proof of claim nor made an  
16 appearance. And that was intentional. We certainly had claims  
17 we could have filed against Congoleum, and we chose not to  
18 which, therefore, lowered the unsecured claims pool in this  
19 case already.

20 And we did that specifically because we did not want  
21 to be subject to the jurisdiction of this Court while we're  
22 litigating in other courts. But what BIW is expressly  
23 intending on doing is drawing us back in here anyways. And  
24 that is why we support the withdrawal.

25 So, with that, I have some comments here. We didn't

1 think it was procedurally proper for us to file a reply after  
2 BIW filed its objection since we had just filed a joinder, but  
3 we have some things to say about it.

4           The first thing is, BIW spends a lot of ink briefing  
5 the low legal standard for a 9019 motion and, specifically, the  
6 fact that the Court has jurisdiction to approve settlement  
7 motions. The problem with that is, what we're arguing about  
8 today is not fairly characterized as a 9019 motion or just a  
9 9019 motion. So those standards are not relevant.

10           A standard settlement would be the portions of this  
11 settlement that are the payment of cash in exchange for  
12 release, covenant not to sue, take positions in existing  
13 litigation. But this settlement asks the Court to hold the  
14 evidentiary hearing, which Your Honor knows. The case law on  
15 9019 motions is that the Court is not supposed to make  
16 findings, but, rather, it's supposed to canvass the issues to  
17 see if the settlement is fair. So, in a real sense, this is  
18 actually the antithesis of a 9019 motion, and the case law on  
19 jurisdiction of the Court to hear a 9019 motion is simply not  
20 relevant to that portion.

21           Just so the Court doesn't think that we're  
22 exaggerating when we say that the entire point of this exercise  
23 is to use those findings in existing District Court litigation  
24 against us and DVL, let's focus on just two of those proposed  
25 fact findings: NM(b) and NN. NM(b) says:

1 "Congoleum is the only successor entity potentially  
2 liable for any alleged environmental liabilities  
3 arising from the former Resilient Flooring Business  
4 operations in Kearny, New Jersey, including those  
5 complained of in the DVL and Occidental lawsuits  
6 pending against Congoleum and BIW. BIW is not  
7 responsible for environmental liabilities" there, et  
8 cetera, et cetera.

9 And then NN says:

10 "All of the Court's findings of fact made herein,  
11 including those related to successorship, were  
12 actually litigated, are necessary to the Court's  
13 decision in this settlement order. The foregoing  
14 findings are intended to have preclusive effect under  
15 the doctrines of res judicata and collateral  
16 estoppel."

17 So they're being very clear. They're going to use  
18 these findings against us, including OCC which has not been a  
19 party to these proceedings.

20 And if that weren't enough, let's just think about  
21 this logically about what's BIW's need for such findings. If  
22 it were worried that Congoleum was going to take a contrary  
23 position in litigation, it would not need 15 pages of findings.  
24 Because Section 2.2 of the settlement agreement called  
25 "Congoleum's Covenant" would be enough. Congoleum -- and this

1 is standard stuff:

2 "Congoleum covenants and agrees that the Congoleum  
3 parties will not allege and assert in already-pending  
4 or future proceedings, including the DVL lawsuit and  
5 the Occidental lawsuit, that BIW is a successor," et  
6 cetera, et cetera, et cetera.

7 That's the typical way of dealing things. The  
8 addition of 15 pages of findings, therefore, has nothing to do  
9 with the two settling parties. It is to use those findings as  
10 an offensive weapon against third parties' impending litigation  
11 outside of this court, and that's exactly why there's a  
12 jurisdictional problem here.

13 I also want to dispel the notion, Your Honor, which  
14 is all over BIW's papers that the 15 pages of findings are  
15 simply about interpreting the prior bankruptcy judge's order.  
16 While I don't agree, BIW at least has a plausible argument that  
17 some of the findings go to that category.

18 But if Your Honor were -- would turn to Roman V or  
19 five of those findings -- so it's proposed findings Y through  
20 KK, five full pages' worth of findings. The first sentence of  
21 Y reads in relevant part -- I'll ellipse over the very  
22 beginning: "The findings" -- excuse me, finding, meaning the  
23 2010 order, "that BIW was not responsible for any of the  
24 liabilities of the Congoleum flooring business is consistent  
25 with the historical operations of BIW and Congoleum."

1 And it goes on then for the next five pages to talk  
2 about and to try to make findings of fact concerning the  
3 historical operations in an attempt to buttress the prior  
4 order. There's no conceivable way that those can be  
5 characterized as interpreting what the Court already found.  
6 It's an attempt to buttress it now and, once again, in this  
7 Bankruptcy Court, while the litigation is pending in the  
8 District Court.

9 Now, even with respect to any findings that could be  
10 interpreted as clarifying the prior order, when this Court is  
11 deciding whether or not to enter a stay to allow the District  
12 Court to consider the motion to withdraw the reference, it  
13 should consider that no matter what BIW is telling you, we know  
14 that the issue is not cut and dry.

15 First of all, the debtor itself tells you right in  
16 this very 9019 motion, paragraph 34 to 35, that its position  
17 today remains unchanged that it disagrees with BIW's position.  
18 I mean, it specifically says "All liabilities not directly  
19 associated with the transferred assets," et cetera, et cetera,  
20 "BIW as the surviving corporation." And then it says, "The  
21 debtor disputes BIW's reliance on the prior Congoleum  
22 bankruptcy and statements in connection with the Century  
23 settlement as an admission on the issue of who has  
24 responsibility," et cetera, et cetera. "The debtor asserts  
25 that nothing in the prior Congoleum bankruptcy," et cetera, et



1 cetera, "absolves BIW of environmental liabilities."

2 So that's what the debtor thinks about this position.  
3 But it's settling. And I understand why the debtor might want  
4 to do that, but this is not cut and dry. But the even better  
5 evidence of that is that, as Mr. Forte was just mentioning in  
6 passing, this very issue was teed up before the New Jersey  
7 District Court in the DVL litigation, and the District Court  
8 wrote an opinion that's available on Lexis. It's 2018 U.S.  
9 District Lexis 143437, Judge McNulty.

10 Now, certainly, I understand. It was a motion to  
11 dismiss. The court couldn't grant -- held that it couldn't  
12 grant BIW's motion to dismiss, in part based upon 12(b)(6)  
13 requirements. But, in fact, it considered the very competing  
14 interpretations of the order at issue here, and it wrote things  
15 that are very revealing:

16 "I note that Congoleum has made a reasonable  
17 argument. For example, Congoleum says that its  
18 disclaimer of liability in the earlier case  
19 encompassed only BIW's liability for asbestos-related  
20 personal injury claims, not all possible liability  
21 including environmental damage to property.  
22 Congoleum's reference to any of the liabilities of  
23 Congoleum Flooring Business cannot be divorced from  
24 its context which was the adjustment of  
25 asbestos-related personal liability claims and

1 insurance coverage therefore in the bankruptcy."

2 The District Court went on to note: "The confirmed  
3 plan itself, which is appended to the order as an exhibit,  
4 carves out environmental liability from its scope."

5 Now, I'm sure BIW is going to argue in its reply that  
6 a motion -- it's just a motion to dismiss opinion, but the  
7 Court goes on to say that significant discovery and fact  
8 findings would be needed to resolve this point. That's the New  
9 Jersey District Court.

10 So that brings us back to the fundamental question.  
11 With this already pending in the District Court, and a motion  
12 to withdraw the reference also pending so that it would wind up  
13 in the same court, why does it make sense for this Court to  
14 make that significant fact finding, especially given the  
15 concerns raised about jurisdiction?

16 BIW argues that the Court has the power to clarify  
17 its prior order even though it was entered in a prior Chapter  
18 11 case by a different judge. Let's leave aside for a moment  
19 whether it can. The question is why it should.

20 If Your Honor was the judge who entered the prior  
21 order, I suppose you might have said I can cut through this,  
22 because I know what I meant. But as of now, the District Court  
23 has had to look at this and grapple with these issues more than  
24 Your Honor has.

25 Now, BIW, nevertheless, argues that there's no

1 jurisdictional issue here, because whether or not BIW is the  
2 successor to Congoleum, allegedly it's just a bankruptcy issue,  
3 relates to interpreting prior court orders. Again, looking at  
4 the findings that I just showed Your Honor before, they go well  
5 beyond that issue. But in any event --

6 THE COURT: Counsel? Counsel? I'm just going to  
7 interject. I've been pretty generous both -- so far for all  
8 counsel, because I recognize this is, essentially, a trial run  
9 for the 28th. But we're not arguing the merits of the  
10 settlement motion, just the basis for a stay.

11 MR. SILBERGLIED: Thank you, Your Honor. May I leave  
12 you, Your Honor, with one final point that goes to  
13 jurisdiction?

14 THE COURT: Sure.

15 MR. SILBERGLIED: Because, again, the -- jurisdiction  
16 is why we believe that it is appropriate to enter a stay. This  
17 is a CERCLA issue. It's not only a state issue. Under CERCLA  
18 Section 107(e), while the parties can agree between and among  
19 themselves to absolve each other of liability or indemnify each  
20 other of liability, that has no force and effect against third  
21 parties.

22 So even if the 2010 order means that Congoleum agrees  
23 with BIW, that can't be used against us. That can't be used  
24 against DVL. That's what they're trying to do by getting Your  
25 Honor to enter these findings.

1 Now, again, I -- I'm not asking Your Honor to make  
2 any ruling on that specific issue. The only reason I'm  
3 bringing it up, Your Honor, is to say in deciding over an  
4 objection to jurisdiction who should resolve this, whether Your  
5 Honor should enter a stay, BIW is telling you only bankruptcy  
6 issues are involved here, so you have no jurisdictional issue.  
7 This is very much a CERCLA issue, Your Honor. It's very much  
8 an issue of whether, even if that were an interpretation, can  
9 you go this far. And it does not make sense for this Court to  
10 be weighing in on that CERCLA issue.

11 Apologies for going beyond what -- where Your Honor  
12 expected, Your Honor, and I thank you for the indulgence on  
13 that last point.

14 THE COURT: Thank you, counsel. Anyone else in  
15 support of the movant's position?

16 Then let me turn to the other side of the equation.  
17 We'll start with debtor's counsel, unless they want to defer to  
18 General Dynamics. You tell me. Mr. Usatine?

19 MR. USATINE: Thank you, Your Honor. Ms. Yudkin is  
20 going to address the motion today on behalf of the debtor.

21 THE COURT: Thank you. Ms. Yudkin?

22 MS. YUDKIN: Thank you, Your Honor. Felice Yudkin on  
23 behalf of the debtor. I would allow Bath Iron Works to make  
24 their arguments first since the debtor filed a joinder to those  
25 arguments. And then, to the extent necessary, the debtors can

1 weigh in.

2 THE COURT: All right. Let me hear then from Bath  
3 Iron Works and General Dynamics. Thank you.

4 MS. STEEGE: Good afternoon again, Your Honor.  
5 Catherine Steege on behalf of Bath Iron Works. Your Honor,  
6 first, with respect to the question of withdrawing the  
7 adversary proceeding, we do not believe that DVL has standing  
8 to withdraw that adversary proceeding. By taking the  
9 procedural route that it did, it was, in fact, ignoring your  
10 order denying their intervention request. And, more  
11 importantly, it was ignoring what Your Honor said when you  
12 denied that request. You denied that request, because the  
13 motion was untimely, because the adversary proceeding had been  
14 settled, and a settlement motion was about to be filed.

15 Every case that was cited to Your Honor by our side,  
16 and no opposing authority was cited by DVL, holds that a motion  
17 to intervene, whether as of right or permissive intervention,  
18 must be timely and that when you seek to intervene into a case  
19 after it's settled, that's not a timely motion. So they lack  
20 standing to withdraw the reference.

21 They have a right to appeal that order. We don't  
22 think they have any chance of success on the merits given the  
23 timeliness requirement and the lack of any case law cited to  
24 Your Honor suggesting you can intervene after a settlement.  
25 And they are not harmed, because they can't object to the

1 settlement at the hearing on the 28th. So, therefore, a stay  
2 pending appeal is not appropriate, but a withdrawal of the  
3 reference is clearly outside of something they can do because  
4 of a lack of standing in that adversary proceeding.

5 Counsel made the comment that 157(d) suggests that  
6 anybody in the world can seek to withdraw anything, but that's  
7 not actually what 157(d) states. It states that: "The District  
8 Court may withdraw, in whole or in part, any case or proceeding  
9 referred under this section, on its own motion or on a timely  
10 motion of any party."

11 By denying the intervention motion, DVL was not a  
12 party. Therefore, under 157(d), it's not one of the entities,  
13 because it's not a party that can seek to withdraw the  
14 reference. So we do think that the request on the adversary  
15 proceeding should be denied.

16 But, in addition, with respect to the settlement  
17 motion, Bankruptcy Rule 5011 makes it pretty clear that the  
18 grant of a stay pending a District Court's decision on a motion  
19 to withdraw the reference is the exception and not the rule.  
20 Rule 5011 assumes that the bankruptcy case is going to continue  
21 rather than be stayed for very good reason.

22 If a movant could easily bring a bankruptcy case to a  
23 halt by filing a motion to withdraw the reference and then  
24 seeking a stay while the District Court, which has its own  
25 caseload and has to sort through everything to figure out what

1 it's going to do with that motion, such motions will become a  
2 tactical choice of every creditor who disagrees with something  
3 that's happening in the bankruptcy case. Withdrawal motions,  
4 which by their very nature are breeding grounds for forum  
5 shopping, would become even more prone to mischief. And so,  
6 for that reason -- and DVL doesn't really dispute this -- the  
7 case law imposes a very heavy burden on movants who seek a stay  
8 under Rule 5011.

9           And despite all of the rhetoric and despite  
10 Occidental's comments about the merits of the settlement, which  
11 we think are appropriately heard on December 28th -- and if  
12 they're going to make their objections to the settlement, they  
13 should do so, I think, in writing. I don't think -- I didn't  
14 really understand the comment that they didn't put anything in  
15 writing, because we had filed our response. I don't understand  
16 how it's more fair to us to start arguing merits without giving  
17 us any notice that that's what you're going to do.

18           But in any event -- and I would also note that  
19 they're a creditor. Whether they choose to participate or not,  
20 under Tennessee Student Loan vs. Hood (sic), the Supreme Court  
21 has made it clear it doesn't matter. You can choose to stay on  
22 the sidelines, but you're still going to be bound if you're a  
23 creditor in a bankruptcy case with notice, which they clearly  
24 are.

25           But the basic problem with the stay motion and with

1 the withdrawal of the settlement motion is that it's built on a  
2 series of incorrect premises which, when you go through them,  
3 it becomes pretty clear why the motion should be denied.  
4 First, they claim that we have to withdraw the reference,  
5 because there's forum shopping going on. Well, what's before  
6 the Court is a motion to settle and, as part of that, a  
7 determination which really is at the heart of determining what  
8 Bath Iron Works' claims are against the estate. It can't be  
9 forum shopping for a debtor to present a settlement motion to  
10 the Bankruptcy Court that's presiding over its Chapter 11 case.

11 This Court has exclusive jurisdiction under 1334(e)  
12 of all property of this bankruptcy estate. The reference has  
13 been sent to it of the bankruptcy estate pursuing (sic) to the  
14 standing orders of the District Court. It's the only court  
15 where the debtor could have filed its settlement motion. So  
16 all of the screaming about forum shopping is really incorrect.

17 Second, the settlement motion is not the same case as  
18 DVL's lawsuit against Congoleum and BIW or Occidental's  
19 lawsuit. All of the arguments that they make about jury trial  
20 rights and other things of that nature are all premised on  
21 blurring the lines between the lawsuit and the settlement  
22 motion. And the Court recognized this, I think, when you  
23 denied intervention where you said that the transaction at  
24 issue is not any environmental contamination. The transaction  
25 at issue is the agreement reached and the findings and,



1 ultimately, the order of the Court confirming the initial  
2 Chapter 11 plan in 2020.

3           And to Occidental counsel's point about CERCLA will  
4 be involved, citing to Section 107(e), which I note DVL does  
5 not cite in their motion, that parties can't agree, the last  
6 time I checked, a court order is a court order. It's not an  
7 agreement of the parties. And there was an order entered by  
8 the court -- the District Court in the last bankruptcy case  
9 that made a finding. That's not an agreement of the parties  
10 that folks can disregard. It's an order of the court. And  
11 that's what the issue is that will be before the Court in  
12 connection with the settlement hearing, nothing having to do  
13 with CERCLA and how parties' agreements interact with each  
14 other.

15           Third, nobody's going to be denied any due process or  
16 deprived of any procedural rights if they're required to make  
17 their objections at the hearing on the 28th. For starters,  
18 with the continuance that the Court granted, DVL and Occidental  
19 will have had substantially more than the 21 days' notice  
20 that's required under Bankruptcy Rule 2002, and that very  
21 substantial notice satisfies DVL's and Occidental's due process  
22 rights, notwithstanding all of the rhetoric that appears in  
23 their moving papers.

24           Further, because the settlement motion is a contested  
25 matter under Rule 9014, all of the relevant Part 7 procedural

1 rules apply. Those rules incorporate all of the Federal Rules  
2 of Civil Procedure that could apply. And pursuant to  
3 Bankruptcy Rule 9017, the Federal Rules of Evidence apply. So  
4 the bottom line is, whichever courts were to hear this matter,  
5 either this Court or the District Court, all of the same rules  
6 would apply.

7           So there's nothing procedurally unfair to DVL about  
8 proceeding this court. And, as a practical matter, this Court  
9 has been very consideration of DVL's interests. It told the  
10 Court it needed more time. And, over objections of my client,  
11 the debtor, the committee, the Court gave them additional time.  
12 So they're getting a full and fair opportunity to make any  
13 objection they want, and the same with Occidental if they  
14 choose to do so. And there's nothing about this process that's  
15 so unfair that it would require the District Court to withdraw  
16 the reference.

17           Finally, the District Court did not decide  
18 (indiscernible) breach for enforceability of the 2010  
19 confirmation order. It was deciding a Rule 12(b)(6) motion,  
20 and it punted on the issue.

21           I'd also note that withdrawing the reference is not  
22 going to terminate the settlement. There seems to be some  
23 suggestion here that if you grant a stay, and the reference is  
24 withdrawn, the settlement goes away. No. All that happens is  
25 a fourth judge, Judge Shipp, who doesn't have the DVL lawsuit

1 or the Occidental lawsuit, both of which are pending in front  
2 of different District Court judges, will be now brought into  
3 the matter to decide whether to approve that settlement and how  
4 to interpret an order as it relates to claims against the  
5 estate. This Court's the only court that has everybody before  
6 it, has the debtor before it where you can proceed against the  
7 debtor, and it's the Court where the motion should be heard.

8           And when you go through all of those things and  
9 understand those facts, it becomes clear that DVL cannot  
10 demonstrate why the District Court will ever grant its motion  
11 to withdraw the reference even -- either on a mandatory or a  
12 permissive withdrawal basis. With regard to mandatory  
13 withdrawal, the debtor points to CERCLA. Occidental points to  
14 CERCLA. But it's not enough to say a federal statute might  
15 apply. You have to show that there is some intersection with  
16 the Bankruptcy Code that creates an unsettled issue of first  
17 impression.

18           And so the -- one of the cases that DVL cites in its  
19 moving papers, Anthony Tammaro, Inc., which is a District Court  
20 of New Jersey decision, kind of illustrates what you have to  
21 show. There, there was a question of whether property that was  
22 considered held in trust under the Perishable Agricultural and  
23 Commodities Act, a PACA trust, whether that property could be  
24 property of the bankruptcy estate under Section 541, and no  
25 court had addressed that issue at that point.

1           That's the type of unique issue that you have to have  
2 in order to withdraw the reference. The other two cases that  
3 DVL cites in its brief are both cases where the Court said,  
4 sure, there's maybe some other federal interest or law at issue  
5 here, but there's nothing unsettled about it, and we're not  
6 going to withdraw the reference.

7           And but even if we assume for the sake of argument  
8 that CERCLA was somehow relevant to the settlement motion, DVL  
9 has actually pled itself out of any mandatory withdrawal of the  
10 reference. It states at page 15 of its brief that it believes  
11 its lawsuit falls squarely within established CERCLA case law  
12 and that the legal issues do not implicate bankruptcy law.  
13 Well, those two things would cause the District Court to deny  
14 mandatory withdrawal of the reference.

15           There has to be an intersection between some other  
16 federal law that affects interstate commerce and the Bankruptcy  
17 Code. There has to be a consideration of both laws. So saying  
18 it doesn't implicate the bankruptcy law means you don't satisfy  
19 one of the standards. The Federated Dept. Store case that they  
20 cite in their brief actually says that.

21           And they haven't shown that there's anything  
22 undisputed about CERCLA. They say it fits squarely. So it's  
23 not an undecided issue that this Court would have to address  
24 and, therefore, mandatory withdrawal of the reference doesn't  
25 apply.

1 Similarly, with permissive withdrawal of the  
2 reference, they cannot establish that they're likely to  
3 prevail. It's important to keep in mind that DVL has not cited  
4 a single case where a District Court has withdrawn the  
5 reference of a settlement motion. We cited several where the  
6 courts have denied that.

7 Counsel referenced Connie's Trading in its argument  
8 and said, well, that was a recommendation by the magistrate to  
9 the District Court judge not to withdraw the reference. Well,  
10 I looked it up on the docket while we were sitting here, and  
11 the District Court, in fact, entered a minute order -- a  
12 clerk's order adopting the recommendation, stating it saw no  
13 good reason why the Bankruptcy Court couldn't decide the  
14 settlement motion. So I think that report and recommendation  
15 and its rationale are good law, and it was, in fact, adopted by  
16 the District Court in denying withdrawal of the reference  
17 there.

18 And turning to the specific elements that courts  
19 examine, there's been a lot of talk about jurisdiction. Of  
20 course this Court has jurisdiction over this. Jurisdiction is  
21 determined by Section 1332. This Court has jurisdiction over  
22 the case.

23 The question that I think parties are really saying  
24 is, is there some constitutional authority to enter a final  
25 judgment? Is the matter core or not, or is it something where

1 the Court can only enter proposed findings of fact and  
2 conclusions of law?

3 And if we look at this as a settlement motion, of  
4 course it's core. And the reason for that is the Third Circuit  
5 has said settlements of claims in bankruptcy in the New Century  
6 Holdings (sic) case "clearly constitute a core proceeding."  
7 The weight of authority within and outside of the Third Circuit  
8 supports that conclusion. A settlement motion essential to  
9 bankruptcy administration is based on the bankruptcy rules and  
10 the Code. You only have approval of settlements in bankruptcy  
11 cases in bankruptcy cases, so it arises in the Chapter 11  
12 process.

13 And when you look at, at base, what it does, it's  
14 determining what's going to happen with property of the estate,  
15 how a debtor's claims or causes of action are going to be  
16 resolved. Those claims or causes of action are property of the  
17 estate, and that's central to what the Bankruptcy Court has the  
18 ability to rule on to a final basis.

19 And, for that reason, that's why all of the citations  
20 to Stern v. Marshall don't amount to much of anything in DVL's  
21 brief. Stern addressed what happens when a court is faced with  
22 a prepetition cause of action based on state law, and it has to  
23 decide it's a judgment, and it doesn't resolve a claim against  
24 the estate. Approving a settlement addresses a debtor's  
25 property interest in the matters being settled, and that's why

1 the many cases we cite in our brief all hold that, even if the  
2 underlying adversary proceeding would be non-core, a settlement  
3 motion can still be decided to a final order by the Bankruptcy  
4 Court, because it doesn't invoke Stern v. Marshall and, in  
5 fact, invokes the basic administrative authority of the Court  
6 to oversee bankruptcy cases.

7           If we look at this as deciding what the meaning and  
8 enforceability of the 2010 confirmation order is, it's also  
9 within the Court's core authority. It's an order entered in a  
10 bankruptcy case that Congoleum was a party to. And what the  
11 settlement does is, essentially, asks this Court to determine  
12 what the scope of that order was and how and if it is  
13 enforceable.

14           And I would take issue with Occidental's discussion  
15 and DVL's discussion of whether this Court can do that under  
16 its core authority. The Lazy Days RV Center case is, in fact,  
17 directly on point. There, the order in question wasn't a  
18 confirmation order, but it was an order dealing with the  
19 assignment of a lease.

20           And a question arose, and there was litigation  
21 pending in the Florida state courts, about how that order  
22 impacted the parties' rights under the lease. And one of the  
23 parties went back to the bankruptcy court, reopened the case,  
24 and sought a declaration about what the order meant. And the  
25 Third Circuit held that deciding that question was in the

1 bankruptcy court's authority, even though "This proceeding may  
2 have been provoked by a state court action and surely impacted  
3 them."

4 Millennium Lab, which deals with approving  
5 confirmation of a plan that contained third-party releases that  
6 would impact pending litigation, reaches the same conclusion  
7 that there is no constitutional impediment to the Court  
8 entering an order simply because that order might affect third-  
9 party rights. I think as the court mentioned in Lazy Days,  
10 every order impacts rights of parties down the road. That's  
11 not a reason why the bankruptcy court can't enter an order.  
12 It's otherwise within its constitutional authority and  
13 determining the order of the prior bankruptcy clearly is within  
14 this Court's constitutional authority to decide.

15 Cementing the conclusion that DVL has no chance of  
16 success on the merits is this whole notion of its right to a  
17 jury trial. There is no right to a jury trial at a hearing on  
18 a settlement motion. There is no right to a jury trial in  
19 determining the meaning of an order. We think that order can  
20 be decided as a matter of law. We don't think the Court needs  
21 to go into whether the finding was correct or not.

22 United Student Aid Association vs. Espinosa clearly  
23 says that an order can be wrongly decided. There, the Supreme  
24 Court said bankruptcy courts ought not to grant these types of  
25 discharges in Chapter 13 plans. It's really not allowed, but



1 it nonetheless enforced the discharge granted in the plan in  
2 that case because no one objected and the order became final  
3 and subject to res judicata affect. We point that out only to  
4 show that the evidence that Congoleum presented back in 2006  
5 when it obtained the finding was in fact correct evidence. But  
6 the Court doesn't ever have to really get there to be able to  
7 find what that order means.

8           And because there is no question that this settlement  
9 motion is a core proceeding, there's no question there's no  
10 jury trial right, it seems highly unlikely, if not improbable,  
11 that the Court would ever withdraw the reference of a  
12 settlement motion. Second, there wasn't much discussion about  
13 irreparable harm other than Counsel made the comment, which it  
14 raised in its reply brief, that somehow the standard of review  
15 on appeal creates irreparable harm for us. But that can't  
16 possibly be true.

17           Whatever the standard of review is, if they appeal an  
18 order in which you grant the settlement motion, that would be  
19 the same standard of review that the Third Circuit would apply  
20 if the District Court granted the settlement motion and they  
21 chose to appeal that.

22           In the cases they cite in their reply for the notion  
23 that the standards are different, that somehow it's a harder  
24 standard if you appeal to the District Court but a lesser  
25 standard if you can appeal to the Third Circuit, don't say

1 that. W.R. Grace vs. Chakarian says it's not a settlement  
2 case. It deals with whether a preliminary injunction should  
3 have been extended. But what it says in passing at the start  
4 of its opinion is that it reviews the bankruptcy court's  
5 decision under the same standard of review as the District  
6 Court.

7 Similarly, in Will vs. Northwestern, which is a  
8 settlement case, the court doesn't say there's different  
9 standards based on which court you're in as the appellate  
10 court, the District Court, or the court of appeals. What it  
11 says is, that whether a settlement meets the settlement factor,  
12 the factors under the Martin case, is judged under an abuse of  
13 discretion. That's going to be true whether they appeal up to  
14 the District Court or up to the Third Circuit. But that if  
15 you're looking at whether the correct legal standard was  
16 applied, that that's a question of law and that gets reviewed  
17 under a *de novo* standard.

18 The court did not make any distinction between what  
19 would be decided in the District Court if it was acting as an  
20 appellate court versus what would happen in the Third Circuit.  
21 So that's not any type of irreparable harm the same way their  
22 original argument that they would have to expend money to get  
23 ready to deal with the case on the 28th doesn't constitute  
24 irreparable harm because they'd have to do the same thing in  
25 the District Court if it heard the settlement motion.

1 And because there's no irreparable harm, because  
2 there's no chance of success on the merits, you don't even have  
3 to look at whether the debtor is harmed. You don't have to  
4 look at whether the public policy favors or disfavors a stay  
5 here. But I would say that because this settlement is tied to  
6 confirmation, there is harm to the debtor. It's not fair for  
7 DVL to say everything should be put on hold while it tries to  
8 move the forum of this settlement motion for no apparent reason  
9 because presumably if they have good objections, Your Honor  
10 will grant them in the same way a District Court would. And if  
11 they don't have good objections, they're going to be denied in  
12 the District Court.

13 Who decides it shouldn't make that much of a  
14 difference. But it will delay confirmation inevitably. It  
15 will take the District Court time to figure out whether it's  
16 going to withdraw the reference, to set a hearing, to do things  
17 that are much easier done in the bankruptcy court, and that  
18 will cause delay, that will delay confirmation, and as  
19 Mr. Usatine argued last week at the continuance hearing,  
20 whenever anything gets continued, that always results in more  
21 costs for the estate and therefore reduces distribution to  
22 creditors. So there is harm to the debtor as a result of the  
23 stay.

24 And finally, DVL has not cited any public interest  
25 that is served by having a stay here. The public interest

1 favors settlements in bankruptcy, favors a quick resolution of  
2 bankruptcy matters. Therefore, we think the public interest  
3 would favor denying the stay here, and we would ask that the  
4 Court deny the stay motion as it relates to the settlement  
5 motion and deny the request for a stay pending appeal as it  
6 relates to the intervention appeal.

7 And if Your Honor has any other questions for me, I'm  
8 happy to answer them. Otherwise, we would just ask that you  
9 deny the relief sought.

10 THE COURT: All right. Thank you, Counsel.

11 Go back now to the debtor. Do you wish to add  
12 anything to the argument that's been presented, Ms. Yudkin?

13 MS. YUDKIN: Thank you, Your Honor, Felice Yudkin,  
14 Cole Schotz on behalf of the debtor.

15 Your Honor, I believe Ms. Steege covered the  
16 arguments in opposition to the motion for stay. The only point  
17 that I would emphasize is the prejudice to the debtor if a stay  
18 is in fact granted. Your Honor has moved confirmation, or  
19 adjourned confirmation to January 8th, and as Ms. Steege  
20 referenced, every additional day that the debtor remains in  
21 Chapter 11 does produce additional administrative expenses that  
22 must be satisfied.

23 The debtor sale closed back in November. I believe  
24 it was November 20th, and the debtor had intended to close that  
25 sale and move expeditiously to confirmation as soon as

1 possible. And so that is the only additional point that I  
2 wanted to make was to emphasize that any additional delay does  
3 prejudice the debtors and ultimately impinges on the creditor  
4 recovery in this case.

5 THE COURT: All right. Thank you, Ms. Yudkin.

6 Does the Committee wish to weigh in?

7 MR. PROL: Yes, Your Honor. This is Jeff Prol from  
8 Lowenstein Sandler.

9 I don't want to belabor the point, but we join in the  
10 arguments made by Ms. Steege and particularly emphasize the  
11 points made by Ms. Yudkin in that this estate is -- there's not  
12 a heck of a lot here and any additional, you know, expense and  
13 further delay has the financial possibility to render the  
14 estate administratively insolvent and so we would urge Your  
15 Honor to keep this case on a path towards confirmation without  
16 any further delay.

17 Thank you.

18 THE COURT: All right. Thank you.

19 Anyone else in opposition to the pending motions?

20 (No audible response)

21 THE COURT: All right.

22 DVL, any brief response.

23 MR. TWARDOWSKI: Yes, briefly Your Honor.

24 First of all, the confirmation order that Bath Iron  
25 Works and the debtor seek to be interpreted was written and

1 signed by the court where the DVL case is pending and the  
2 Occidental case. That's the best place to go to have it  
3 interpreted and applied.

4 On a settlement motion, because of the nature of it,  
5 it's designed to canvass the issues, I think the word is from  
6 the In re Martin factors and some of the other cases. It's not  
7 intended to be a thorough adjudication. There would be no  
8 point in settling if that were the case.

9 And Counsel for BIW mentioned about the effects of  
10 the order on other people down the road. There's nothing down  
11 the road about this. This order will have in it the closest  
12 affects against our client's claims and Occidental's claims in  
13 two cases pending in the District Court at the time it's signed  
14 and they will try to use it that way. Our alternative would be  
15 to undo it. So there's nothing down the road about it.

16 As far as the public interest goes and resolving the  
17 bankruptcy disputes, if this was a bankruptcy dispute that was  
18 being resolved, solely, maybe there would be some credence to  
19 that position, but they're trying to resolve certain claims  
20 brought against them by other parties in other proceedings. We  
21 don't intend to have more judges involved in all of this. If  
22 reference is withdrawn, we would certainly seek to consolidate  
23 the withdrawn items, the pending case in front of Judge  
24 McNulty. That's what we've been trying to do from the very  
25 beginning.

1           On the issue of whether it's core or not, it's very  
2 easy to say that any type of settlement you slap a 9019 number  
3 on is core. Certainly the proceeding to approve a settlement  
4 is core, but what the Third Circuit and Supreme Court  
5 emphasized is that you have to look past the label. This is  
6 not a disposition of bankruptcy issue. We do have an  
7 intersection with the 9019 standards, which are bankruptcy  
8 rules, we have CERCLA decisions and so forth, so there are  
9 bankruptcy issues clashing with other federal statutes. But  
10 there's no Code provisions at issue and there's no Bankruptcy  
11 Code law provisions that are being disposed of.

12           And I would point out, the Lazy Days case that was  
13 referred to by Counsel to Bath Iron Works, did address rights  
14 under Section 350(a) of the Bankruptcy Code concerning the  
15 power of a bankruptcy clerk to reopen a case, and  
16 Section 365(f)(3), which has to do with anti-assignment  
17 provisions. There's nothing like that here.

18           So I'm finished for now, Your Honor, unless there's  
19 some further reason to respond or to answer the Court's  
20 questions.

21           THE COURT: All right. Thank you, Counsel.

22           MR. TWARDOWSKI: Thank you.

23           THE COURT: Anyone else?

24           MR. SILBERGLIED: Yes, Your Honor. Russ Silberglied  
25 for Occidental, again. Four quick points.

1 First of all, we heard that there was no  
2 jurisdictional issue that was stated. Similarly, the issue on  
3 whether it's jurisdiction or adjudicatory authority is this:  
4 is it appropriate for this Court to enter findings for use not  
5 in this Court but in a CERCLA case which have an affect on  
6 CERCLA law to be used against not the debtor but a party that  
7 is not subject to the Court's jurisdiction?

8 Second point, Your Honor, Counsel for BIW argued that  
9 the 2010 order doesn't fall into the CERCLA 107(e) issue that I  
10 talked about because it's an order not an agreement. There's  
11 actually significant irony in that argument, Your Honor,  
12 because what they are now asking Your Honor to do is to enter  
13 an order without thinking about whether that order will then be  
14 used 10 seconds later in the CERCLA case to argue that whatever  
15 107(e) would have provided, it's too late because now we have  
16 an order of the court. That actually heightens the concern  
17 before Your Honor rather than ameliorates it.

18 Third point. As I predicted, Counsel for BIW argued  
19 that you have jurisdiction because this is a Rule 9019 motion,  
20 citing traditional settlements. Not one of the cases that she  
21 cited, certainly not (indiscernible), had as a component of  
22 that case a requirement that that settlement include 15 pages  
23 of fact findings about an issue that the debtor has no  
24 incentive to contest.

25 Final point, Your Honor. You heard about irreparable



1 harm. There is irreparable harm here to OCC and that  
2 irreparable harm is that we are being put to a Hobson's choice  
3 because if we participate, there was a request of us that we  
4 respond item by item to pages and pages of evidence, to put in  
5 our own evidence, etcetera, etcetera. If we do that, Your  
6 Honor, there is an argument that we will have waived our  
7 argument on subject matter jurisdiction, which we have no  
8 intention of doing. So we are being put to a Hobson's choice  
9 if this goes forward of participating and waiving our arguments  
10 concerning jurisdiction or not participating and getting an  
11 adverse ruling, and that is most certainly harm that can be  
12 considered by this Court on a stay motion.

13 Thank you, Your Honor.

14 THE COURT: Thank you.

15 All right. Thank you, Counsel. All well argued.

16 Bear with me a couple of moments.

17 All right. Before the Court are two motions filed on  
18 behalf of DVL and DVL Kearny Holdings, joined in by Occidental,  
19 seeking -- Occidental as to only part of the motions -- seeking  
20 either to stay the Court's consideration of a proposed  
21 settlement pending resolution by the District Court of a motion  
22 to withdraw the reference filed by DVL with respect to the  
23 adversary proceeding and the settlement itself or  
24 alternatively, to stay consideration of the settlement pending  
25 appeal of this Court's prior order entered approximately

1 November 10, 2020, denying DVL the opportunity to intervene in  
2 the pending adversary proceeding. The Court has heard oral  
3 argument on both matters simultaneously as they involve many of  
4 the same issues.

5 The Court has jurisdiction over these two motions  
6 pursuant to 28 U.S.C. Section 1334. The consideration of the  
7 motion to stay pending the withdraw of the reference, as well  
8 as the motion to stay pending the appeal, are core matters  
9 under 28 U.S.C. Section 157(b).

10 The Court is not inclined to grant either of the  
11 motions for the following reasons:

12 With respect to the request for a stay pending  
13 disposition of the withdrawal of the reference motion, pursuant  
14 to Federal Rule of Bankruptcy Procedure 5011(c), the Court  
15 notes that it has discretion to enter a stay, however, that the  
16 presumption is in fact that the administration of a bankruptcy  
17 proceeding will continue pending the motion to withdraw the  
18 reference. Because this Court is of the view that the  
19 withdrawal of the reference with respect to the settlement in  
20 the adversary proceeding are unlikely to succeed and that there  
21 would be substantial harm to the delay in the administration of  
22 the Chapter 11 proceeding, the Court is exercising its  
23 discretion not to stay the matter further under 5011(c).

24 The Court is taking into account the fact that  
25 unfortunately, in this era of judicial vacancies in the

1 District Court, the substantial delay in civil proceedings  
2 moving forward in the District Court as a result of COVID-19,  
3 the speed in which the District Court can address these motions  
4 to withdraw the reference and/or a motion to approve a  
5 settlement, does not persuade the Court that that is the more  
6 expeditious route to go and is not beneficial to the parties,  
7 to the litigants, and is certainly not consistent with public  
8 policy to move a Chapter 11 proceeding forward in a expeditious  
9 matter. As long as the Chapter 11 remains open, there's  
10 potential for administrative expenses, including the occurrence  
11 of quarterly fees, the obligation to file monthly reports, and  
12 the like.

13           This Court has serious doubts and is not persuaded by  
14 any case law put forward that DVL nor any other non-party to an  
15 adversary proceeding has standing to indeed withdraw the  
16 reference of a particular adversary proceeding. Nor does it  
17 make sense for a non-party to withdraw the reference with  
18 respect to a settlement of an adversary proceeding in which it  
19 is not a litigant.

20           There is no discernible to this Court prejudice to  
21 DVL or Occidental or other parties in moving forward with this  
22 case and moving forward towards a hearing on the proposed  
23 settlement. The lack of prejudice or irreparable harm, or any  
24 harm, to DVL and others in denying either the right to  
25 intervene, which was initially determined, or by hearing the

1 settlement is found in the fact that DVL and others maintain  
2 their rights as creditors, to the extent they are creditors, to  
3 object to a settlement, to object to confirmation, and most  
4 importantly, to contest the applicability of this Court's  
5 potential findings in the District Court or any other forum.

6           Indeed, the prejudice this Court finds to DVL or the  
7 posited prejudice to DVL and Occidental, is bottom dog  
8 conjecture. Conjecture that the Court will approve a  
9 settlement, conjecture that the Court will agree to employ  
10 certain language in its findings and conclusions of law in  
11 approving the settlement, and conjecture that the non-  
12 bankruptcy courts, including the District Court in pending  
13 CERCLA litigation will apply these Court's findings and  
14 conclusions to the detriment of DVL and others, contrary to the  
15 law.

16           All of that alleged prejudice is simply conjecture  
17 and the parties are protected for due process concerns by the  
18 ability to contest the settlement, take issue with the proposed  
19 findings and conclusions, appeal any erroneous rulings, and  
20 argue that those rulings should or should not have any bearing  
21 on the decisions being litigated -- on the issues being  
22 litigated in the District Court.

23           With respect to a stay pending appeal, the Court  
24 recognizes that a stay is an extraordinary remedy to be granted  
25 only in limited circumstances. Under Federal Rule of

1 Bankruptcy Procedure 8007, a party can move to stay the effect  
2 of the bankruptcy court order. In this case, it would be the  
3 stay pending the Court's denial of the right to intervene  
4 pending an appeal, and that's under Rule 8007. Whether the  
5 stay applicant can prevail requires that the applicant make a  
6 strong showing that it is likely to succeed on the merits, that  
7 the applicant will be irreparably injured absent a stay, that  
8 the issuance of the stay will substantially injure the other --  
9 the Court must determine whether the issuance of a stay will  
10 substantially injure other parties interested in the  
11 proceeding, and where the public interest lies.

12           With respect to these factors, the most significant  
13 as determined by the Third Circuit in In re Revel AC, Inc.,  
14 802 F.3d 558 (3d Cir. 2015), the most significant among these  
15 factors are of course the movant's ability to demonstrate a  
16 likelihood of success and that is arguably the most important  
17 consideration as well as the irreparable harm.

18           With respect to the first factor, there is a  
19 requirement that there be a sufficient degree of success for a  
20 strong showing that there is a probability of prevailing. And  
21 then, based on the strength of that showing, the movant must  
22 demonstrate based on a sliding scale approach that the court's  
23 assessment of the remaining factors will impact the degree of  
24 possibility of success that the movant must show.

25           To sum up, all four factors are interconnected and

1 the analysis should be did the applicant make a sufficient  
2 showing that it can win on the merits, has to be significantly  
3 better than negligible but not greater than 50 percent, and  
4 whether it will suffer irreparable harm. This Court is not  
5 persuaded that movant has prevailed on either of those two  
6 factors.

7           This Court is confident that it has jurisdiction to  
8 hear a settlement of an adversary proceeding under Rule 9019  
9 that had been brought before this Court, that it is a core  
10 proceeding. And whether the Court is considering the proposed  
11 settlement or the Court is considering determining the  
12 parameters, the scope, and the meaning of a prior order of  
13 confirmation and sale order in a prior Chapter 11, this Court,  
14 again, is confident that those are core matters. And as core  
15 matters, the Court is confident that the appropriate place to  
16 resolve those issues are before the bankruptcy court.

17           The bankruptcy court is in a, if not better, it's  
18 certainly an equal position to rule on the scope, the meaning,  
19 the parameter, the interpretation of the 2010 confirmation  
20 order or the prior order of sale as compared to the selection  
21 of a District Court judge on a rotating wheel who has no  
22 familiarity respectfully -- or no greater familiarity with the  
23 issues at hand. The Court, as I've said, also takes into  
24 account the delays that would incur.

25           So for all of those reasons, as well as those that

1 have been expressed in the briefing -- I'm not going to simply  
2 repeat the positions which the Court adopts put forward on  
3 behalf of Bath Iron Works -- the Court is not prepared to enter  
4 a stay on either the Rule 8007 or Federal Rule of Bankruptcy  
5 Procedure 5011(c). The Court, just to make clear, finds no  
6 likelihood of success, no potential harm, a burden on the  
7 administration of this case, and a lack of prejudice given the  
8 options remaining available to DVL and Occidental.

9           The Court has some concerns, obviously, with the  
10 scope of the requested proposed findings, which the Court will  
11 address on the 28th. I am sure we're going to discuss some of  
12 those concerns when we address the process for that hearing at  
13 our pre-hearing conference in a few moments.

14           At this point in time, are there any questions or  
15 concerns with the Court's ruling, or rulings?

16                           (No audible response)

17           THE COURT: All right.

18           I am simply going to enter straightforward orders  
19 referencing the Court's ruling from the bench and incorporating  
20 same to avoid having to have a contest over language in the  
21 proposed orders.

22           Before we get to our pre-hearing conference, there is  
23 also a pending stay relief motion. What are the parties'  
24 intentions with that stay relief motion?

25           MR. FORTE: Your Honor, it's Earl Forte for DVL.

1 Just speaking very frankly, can I ask Your Honor is there a  
2 snowball's chance in you know what of me getting a stay relief  
3 right now?

4 (Laughter)

5 MR. FORTE: I think I won that last one.

6 THE COURT: What I would venture to say is there's a  
7 strong chance you might get it on the 28th one way or the  
8 other.

9 MR. FORTE: (Audio interference) that. I'd like to  
10 win once in a while, Your Honor. Thank you.

11 THE COURT: But you know, everybody should get  
12 parting gifts. Why don't we carry it to the 28th?

13 MR. FORTE: I'm sorry. What did you say, Your Honor?  
14 I didn't hear it.

15 THE COURT: I'm sorry. Why don't we carry the motion  
16 to the 28th?

17 MR. FORTE: Agreed Your Honor, thank you.

18 THE COURT: Thank you, Counsel.

19 All right.

20 Then, turning to the conference on how we're going to  
21 proceed on the 28th, I need to clarify what's expected of the  
22 Court. You know, and it's granted, I have reviewed somewhat  
23 what's been filed to date. Have I reviewed the four volumes  
24 that have been submitted? No.

25 But there were comments made in the arguments that



1 concern me in that it seems to me that the issue in the  
2 adversary proceeding, and what has always been requested of the  
3 bankruptcy court, is to rule on the scope. I've set  
4 parameters, and potentially, the impact on Bath Iron Works of  
5 the orders entered by Judge Pisano confirming the case in 2010  
6 by the bankruptcy court in approving the sale. It is not my  
7 understanding that I am determining, as you pointed out  
8 Ms. Steege, whether those decisions were right or wrong. It's  
9 just whether or not they -- well, whether or not they were  
10 actually made.

11 And what concerns me is the discussion and the proofs  
12 put in as to the expert testimony with respect to mergers and  
13 acquisition and the like. I mean, I would think the evidence  
14 should be what was put before the bankruptcy court and the  
15 District Court over a decade and a decade and a half ago. It's  
16 not for me now to prove or to rule on the underlying liability  
17 issues. I may not be clear because it's been a long morning,  
18 but Counsel for Bath Iron Works, do you understand my issues?

19 MS. STEEGE: Yes, Your Honor, we do. And the  
20 reason -- well, a couple of things.

21 First off, the reason why the expert reports were  
22 submitted to you, if that -- in discussing this with  
23 Mr. Usatine, he wanted to make certain that you have all of the  
24 expert reports for whatever you would do with them, so we did  
25 that and we submitted those. Our basic position is that the

1 language of the 2010 confirmation order, which was based on a  
2 finding at a contested hearing where parties objected in 2006,  
3 is clear and unambiguous on its face. It says Bath Iron Works  
4 has no responsibility for any liabilities, which means every  
5 liability including environmental liability.

6           The focus of the arguments against that order have  
7 always been to go behind the order and somehow say the order  
8 wasn't correct in the first instance. I don't think under  
9 United Student Aid vs. Espinosa, Your Honor has to get into  
10 that, or Stoll v. Gottlieb, or any of a number of Supreme Court  
11 decisions dealing with orders when they're done and they're  
12 final (audio interference) what they say, whether they were  
13 right or wrong or somewhere in between.

14           But having said that, because the debtor previously,  
15 and DVL, have tried to argue that somehow that order wasn't  
16 correct or whatever, we put all that out there so that Your  
17 Honor can see it. We think you could make the findings. We  
18 don't really think that you're the subject to any legitimate  
19 contest, but it's more in the nature of, I think, belts and  
20 suspenders if you will, because everything anybody ever wants  
21 to talk about is not what the order says but what they think  
22 happened back in the '80s, and that's why we put that forth.

23           So I hope that clarifies what Your Honor's asking,  
24 but that's why it's there. It's not because we think it's  
25 necessary to interpret the order. We think you can read that

1 paragraph, look at what happened in the bankruptcy case, and  
2 come to the conclusion that that order covered all liabilities  
3 of every type and character, including environmental  
4 liabilities.

5 THE COURT: So let's talk practically. What  
6 witnesses do the movants on the settlement motion intend to put  
7 forward?

8 MS. STEEGE: What do we intend to put forward?

9 THE COURT: Yeah, as far as in evidence. Right now,  
10 we're talking process. We're having a Zoom evidentiary hearing  
11 on the settlement. And I've always said that I would prefer to  
12 have direct by certification and leave the parties the  
13 opportunity to cross-examine. We have to identify the exhibits  
14 that will go in. It's a lot of work on chambers and my staff.  
15 I want to streamline this for everybody's benefit. So I'm  
16 trying to get a handle on who the witnesses will be and how  
17 best to approach this.

18 MS. STEEGE: I mean, much of the evidence, Your  
19 Honor, and Mr. Thomson can speak to it. Maybe I should just  
20 let him talk. But most of it is basically in those four  
21 volumes. Most of it's court records, so it would just go in on  
22 the authenticity certification of itself. It's what happened  
23 in the prior case. And then there is deposition testimony of  
24 various parties saying what happened in the bankruptcy case.  
25 And then there might be one witness where we've done a

1 declaration where we make him available for cross but I'll let  
2 Mr. Thomson address it.

3 MR. THOMSON: Judge Kaplan, this is --

4 THE COURT: Yes.

5 MR. THOMSON: -- Wade Thomson on behalf of Bath. I'm  
6 a colleague, a partner of Ms. Steege.

7 So Ms. Steege is exactly right, and we submitted to  
8 the Court a proposed schedule for the exchange of objections.  
9 But certainly in regards to Your Honor's questions just now  
10 about what the Court is to rule on, if you look just at our  
11 primary request and our request about the interpretation of the  
12 prior order, indeed, you know, the overwhelming amount of  
13 evidence that we have put forth in the appendices are just  
14 documents, pleadings, and the, you know, confirmation order  
15 itself and the settlement that's subject to that into evidence  
16 so it can all be recognized by judicial notice.

17 We have been seeking ever since we filed these proofs  
18 three weeks ago, whether anybody has any objections. We  
19 finally got DVL to agree to a schedule for them giving us  
20 objections yesterday. They're going to give us their  
21 objections. But as it relates to those pleadings, I don't know  
22 what real, you know, non-frivolous objection there could be.  
23 They're exactly what we've always said. So those would be our  
24 primary, Your Honor. And what we would propose is that we  
25 first, you know, since this is where the action is and this all

1 we think Your Honor needs to make a decision, is that we --  
2 once we hear back from DVL on the date within our proposed  
3 scheduling order that there is no objection on those things,  
4 presumably, we'll be in a position to tell Your Honor which  
5 exhibits are going to go in without any objection. And  
6 presumably, they will be the bankruptcy filings and pleadings  
7 and orders from the previous bankruptcy.

8           And frankly, we could then have oral argument and  
9 that could be all that's needed on December 28th. However, to  
10 the extent necessary, our second bucket of evidentiary  
11 materials relating to the confirmation order is we provided,  
12 you know, deposition designations from witnesses who testified  
13 in that bankruptcy hearing, which corroborate our  
14 interpretation. And again, our primary position is, you don't  
15 even need to read that.

16           The bankruptcy filings are unambiguous. Nobody in  
17 the DVL action, including Congoleum or DVL, has ever suggested  
18 they're ambiguous. Congoleum admitted in discovery in our  
19 matter, and we put this into our brief that we filed with Your  
20 Honor, that the only thing the Court needs to interpret the  
21 settlements that were at issue in the bankruptcy are the  
22 settlements themselves.

23           So in other words, Your Honor, everyone agrees, no  
24 one said otherwise, that Your Honor can read the papers and  
25 interpret them. And so, you know, the overwhelming majority of

1 all our evidence is that, and we can have a summary argument on  
2 that. And again, to Ms. Steege's point, the rest of our  
3 appendices are evidence, including both documents and  
4 deposition testimony, concerning the 1986 agreements, as well  
5 as some, essentially, admission type evidence over many years  
6 from Congoleum that they were indeed the successor.

7           Now, again, to Ms. Steege's argument, that's  
8 essentially going behind or above, in this position, what the  
9 bankruptcy order was and just confirms what we've said all  
10 along and what was said in very plain English many, many years  
11 ago in bankruptcy court in New Jersey, that BIW has no  
12 liability relating to the flooring business. So we're prepared  
13 to also march through that. That will have a ton of deposition  
14 designations. We filed those designations weeks ago.

15           We've asked DVL and Occidental if they want to give  
16 us any counter designations. DVL wouldn't respond until last  
17 night. They finally agreed to dates. Occidental, as they  
18 admitted today, said they decline to participate in the  
19 process. So I'm frankly hopeful that we're not going to have  
20 very many objections at all because none of should really be  
21 contested.

22           If we do have to get into that evidence on the 28th,  
23 and by that evidence, I mean anything beyond arguing the  
24 filings in the previous bankruptcy. To the extent we are going  
25 to do that, our request, and even to the extent you want to

1 hear testimony from people who participated in the previous  
2 bankruptcy. So for example, we deposed twice Mr. Feist who is  
3 the former CFO of Congoleum. He is the one that signed the  
4 declaration to the key settlement agreement there where  
5 Congoleum acknowledged that BIW has no responsibilities for the  
6 flooring business. We deposed him, and he admitted that, yes,  
7 environmental issues were in play at the time, directly  
8 contrary to what Occidental and DVL have tried to argue today  
9 on the merits.

10 But you don't need to do that. You can read the  
11 order just like we've always said. It says any liabilities,  
12 that includes environmental. But to the extent you have a  
13 question, Judge, we have sworn deposition testimony from  
14 Mr. Feist on Congoleum admitting that environmental liabilities  
15 were at issue in that settlement.

16 To the extent you want to hear that evidence, Your  
17 Honor, what we would propose to do, typical of any trial, we  
18 would say on behalf of BIW, we would now call Mr. Howard Feist  
19 and we would tender into evidence his designated deposition  
20 testimony. Mr. Feist lives in Boston. He is no longer  
21 employed by Congoleum. He's beyond the 100 miles. So under  
22 Rule 32 of Federal Procedure, he's not available for trial. We  
23 don't control him, and so we would submit his deposition  
24 testimony. They can submit their counter designations to the  
25 extent they have them.

1           Again, I mean that's a lot of work, but from  
2 everybody, including the Court before the holidays and around  
3 the holidays. We appreciate that. But this is because this is  
4 the argument they want to make. We're only putting all of this  
5 forward to show Your Honor, look, we're not scared of going  
6 beyond. The Court didn't get it wrong before. Congoleum  
7 didn't get it wrong before. To the extent anybody wants to go  
8 beyond what and try to say, oh, this didn't include  
9 environmental. No, no, no, Mr. Feist admitted it included  
10 environmental. We're happy to show that.

11           Our proposed process, Your Honor, is to go witness by  
12 witness, but first go through the bankruptcy pleadings. We can  
13 have oral argument on that because it's judicial -- you know,  
14 as I mentioned before, it's judicial notice and it's pleadings,  
15 and it's an interpretation. We don't think Your Honor needs  
16 anything more than that. To the extent we go beyond that, we  
17 are happy to tender by depositions all the various testimony.  
18 We can either just tender it en masse and hopefully we can work  
19 this out with the parties between now and then and submit all  
20 of the designations and counters highlighted and just -- and  
21 say something along the lines that we tender the testimony of  
22 Mr. Feist. It's designated and we move it into evidence. And  
23 we can give one or two, you know, minutes of explanation as to  
24 what that evidence is, but I think that would suffice for our  
25 purposes.



1 To the extent we need to -- you know, to the extent  
2 we need to have any dispute over whether any evidence or  
3 specific testimony should come in, we're happy to have that,  
4 but to try to work that out -- excuse me, with DVL between now  
5 and then. DVL was at all of these depositions, I should  
6 mention, as was Congoleum, so any objections are presumably  
7 argued in the deposition record and we can work them out,  
8 hopefully.

9 So I'm hopeful that there's not too much action on  
10 that. You know, alternatively, if Your Honor wants, we could  
11 read the Q and A exchanges in from the depositions. I don't  
12 think that's necessary. I think that would take --

13 THE COURT: Oh, God no.

14 Go ahead.

15 MR. THOMSON: I'm very -- thank you for saying that,  
16 Your Honor, I think, for all of us.

17 So that's our position as to how we would proceed in  
18 this, very much like a trial, but you know, we're prepared to  
19 go as a trial. But because of what Your Honor has just said,  
20 you know, we don't want to waste anyone's time in the next  
21 couple of weeks on objections and designations to evidence that  
22 may not be necessary. We think it's important, but you know,  
23 if Your Honor thinks that you're constrained to just review the  
24 bankruptcy pleadings, we have no problem with that. That's  
25 what we've been saying all along that that's all we need

1 because it's plain as day, but we also have the backup on that.  
2 So at least on the bankruptcy stuff, not getting into the 1986  
3 stuff, we can do all that evidence on the papers.

4 I will say the one exception to that, Your Honor, is  
5 we have one live BIW witness and because we control him, we are  
6 prepared to bring him live -- live virtually -- and tender him  
7 for cross-examination. I will say I don't think that's  
8 necessary either because he was also deposed by Congoleum and  
9 DVL and we've submitted a declaration and his testimony is  
10 going to be very consistent with that declaration. And as we  
11 set forth in our brief, it's very clear what it was.

12 BIW did not object to the previous bankruptcy when  
13 all the millions and tens of millions of dollars in insurance  
14 rights were being sold precisely because Congoleum said we're  
15 the successor and BIW (audio interference) --

16 THE COURT: I don't want to get into the weeds or  
17 into arguments. I appreciate it.

18 MR. THOMSON: Yeah. (Audio interference)

19 THE COURT: Thank you. Thank you, Counsel.

20 MR. THOMSON: Sorry.

21 And that's all I was going to say. That's the one  
22 live witness we may have, Your Honor.

23 THE COURT: And who is that witness?

24 MR. THOMSON: His name is Dan Ferguson. He's  
25 essentially in charge of risk for BIW and he was -- he's still

1 employed by us and he was there in 2000-whenver it was, when  
2 we got notice of the settlement.

3 THE COURT: All right.

4 Mr. Twardowski, your thoughts, or Mr. Forte?

5 MR. TWARDOWSKI: Your Honor, this is Mr. Twardowski.

6 Again, without getting into argument, we reached an  
7 agreement last night as to a process going forward over the  
8 next week and a half. It's going to be a very tight schedule  
9 to accommodate, but given the hearing scheduled for the 28th  
10 and the objection deadline of the 18th, we'll obviously need to  
11 and have to live with it.

12 Mr. Thomson's right that we've seen the proof that he  
13 has submitted. We've got now deadlines to file counter  
14 designations and raise objections, to the extent there are any.  
15 I suspect there will be at least some.

16 We've got a meet and confer deadline to resolve or  
17 try to resolve anything. And to the extent there's anything  
18 unresolved, we'll present that to Your Honor timely before the  
19 hearing so Your Honor will have an opportunity to review it and  
20 address. We'll provide, according to our schedule, by the  
21 17th, which is next Thursday, a day before our objections are  
22 due, whatever counter proof we have and we've built in a window  
23 for BIW to respond with any rebuttal evidence of its own.

24 So again, without arguing the issues or the merits, I  
25 think there's a process in place to go forward with the hearing

1 on the 28th. I do think, and I'm just repeating what Mr. Forte  
2 had said previously, that we're cramming an awful lot in in a  
3 very short period of time, and in my judgment for no good  
4 reason. If the confirmation hearing is not going to take place  
5 until 2022, to me there's no magic in having a hearing on the  
6 settlement motion on December 28th, the first business day  
7 after the Christmas holiday, with all the other things that  
8 need to be done in the interim. But I recognize Your Honor's  
9 already made that scheduling decision, I simply offer that as  
10 an observation.

11 THE COURT: All right. Thank you.

12 So I have -- Mr. Schotz had sent down on behalf of  
13 Bath Iron Works a joint stipulation among Congoleum, DVL, and  
14 Bath Iron Works. That's the reference. I'm staring at it now.  
15 I don't really -- it's only, what? Two paragraphs. I don't  
16 see dates in here. Do you have separate dates?

17 MR. TWARDOWSKI: It's eight paragraphs long, Your  
18 Honor, and there's dates starting with the 17th, which is the  
19 date the objections are required to be filed along with counter  
20 designations. A pre-hearing responsive brief if we'll file any  
21 will be due on the 18th of December. BIW's reply proof in  
22 response to whatever counter proof we submit will be due on  
23 December 22nd. That same day, we've agreed to meet and confer  
24 and attempt to resolve objections. And to the extent those  
25 objections or issues are not resolved, we've agreed to present

1 them to the Court the following day on the 23rd. And then  
2 finally, no later than Christmas Eve, the parties will provide  
3 the Court with a bound copy of the exhibits and deposition  
4 designations.

5 I'm not sure what Your Honor's looking at that  
6 doesn't have the dates, but I printed out Mr. Schotz's letter  
7 to the Court (audio interference).

8 MR. TWARDOWSKI: (Audio interference) Twardowski.  
9 Your Honor, I think the confusion might be that we submitted  
10 two separate documents. One was with regard to the experts and  
11 then this morning, we submitted the one with the dates in it.  
12 So Your Honor may be looking at the first one we submitted,  
13 which was only as to the experts.

14 THE COURT: All right. That's what the difference. I  
15 didn't get a chance to see this morning. Just bear with me one  
16 second.

17 All right. Well, we will get these stipulations  
18 filed. I think to the extent the parties are going to  
19 stipulate as to the admissibility, obviously, not the weight,  
20 but the admissibility of documents, great. It makes  
21 everybody's life easier. I am looking to try to do that.

22 I will tell you now, I'm looking at the calendar, we  
23 set this down for the 28th. It's the Court's intent to move  
24 this forward, which is why I wanted it in the last week of  
25 December. If the parties agree and need another day or two for

1 that week, I will rearrange my schedule. I will do what it  
2 takes.

3 I understand it's the first day back after the  
4 Christmas holiday. If the parties could talk and think the  
5 29th or 30th or even the 31st are better, just let me know and  
6 I'll rearrange the schedule.

7 I don't mean to make this punitive on the lawyers,  
8 just on my staff, apparently. So then you'll let me know.

9 To the extent I have to make a call on either  
10 exhibits or witnesses, I'll be prepared to do that for you.  
11 And it sounds to me that the bulk of what is going to go on is  
12 simply oral argument referencing documents to which there have  
13 been stipulations, but that's at this juncture. I'm going to  
14 give DVL an opportunity to put forward its position on the  
15 various proffered evidence.

16 All right. What we will need to know in advance of  
17 the hearing and we'll send out the email addresses and contact  
18 information for anyone who will be arguing or testifying on the  
19 date of the hearing so that we can have proper Zoom invites go  
20 out. If there are any issues in the course of the next two  
21 weeks and you need the Court's assistance, just contact  
22 chambers. I'll make myself available.

23 Actually, my law clerk has just suggested we could  
24 actually have the trial on New Year's Eve. It's been a lousy  
25 year anyway. Maybe she's right.

1 UNIDENTIFIED SPEAKER: I'll vote for that, Your  
2 Honor.

3 THE COURT: Can't argue with that.

4 UNIDENTIFIED SPEAKER: It would be a fitting end to  
5 2020.

6 THE COURT: It sure would be. So I'll leave that for  
7 you all to discuss.

8 I also always throw this out. If the Court can be of  
9 assistance in trying to bridge any gap in any settlement, I  
10 understand you've had a plethora of mediation efforts or  
11 several mediation efforts, I believe, but if the Court can  
12 assist, reach out for the Court as well. I'm not going to put  
13 pressure on anyone, but it's got to be consensual.

14 Anything else I can assist with?

15 MR. MILLNER: Your Honor, it's Robert Millner. Good  
16 afternoon.

17 Can I raise a housekeeping issue about this case  
18 that's not having to do with any of the motions today?

19 THE COURT: Sure.

20 MR. MILLNER: The confirmation is set for January 8,  
21 and I did receive, I think, one or two emails from somebody in  
22 your office saying that an objection deadline to confirmation  
23 would be set. I've heard the date January 4th, but I don't  
24 know that. I don't think there's anything on your docket which  
25 publicly --

1 THE COURT: I'm sorry. I thought we put a text  
2 order.

3 MR. MILLNER: Maybe I missed it.

4 MS. YUDKIN: Yes, this is Felice Yudkin from Cole  
5 Schotz, Your Honor. It was posted to the docket earlier this  
6 week, I believe --

7 MR. MILLNER: Okay. I'm sorry.

8 MS. YUDKIN: -- in a separate minute entry.

9 MR. MILLNER: I'm sorry, Your Honor. I must have  
10 missed it. I'm sorry.

11 THE COURT: No. It's a big docket. Make sure you  
12 are looking in the main case and not the adversary.

13 MR. MILLNER: (Audio interference)

14 THE COURT: All right.

15 Anything else I can help anyone with?

16 MR. MILLNER: May I ask, what is the objection  
17 deadline?

18 THE COURT: Ms. Yudkin, do you know it offhand?

19 MS. YUDKIN: It is January 4th, I believe. I'm just  
20 pulling up my calendar. January 4th is the objection deadline  
21 and the new voting deadline is January 5th.

22 MR. MILLNER: Okay. Thank you.

23 THE COURT: All right.

24 All right. Anyone else? Otherwise --

25 MR. TWARDOWSKI: Not from DVL, Your Honor. We



1 appreciate your participation. Thank you.

2 THE COURT: Thank you.

3 All right. Everyone, have a good weekend.

4 MR. TWARDOWSKI: Thank you.

5 UNIDENTIFIED SPEAKER: You too.

6 MS. YUDKIN: Thank you, Your Honor.

7 UNIDENTIFIED SPEAKER: You, too, Your Honor.

8 \* \* \* \* \*

9 **C E R T I F I C A T I O N**

10 We, LIESL SPRINGER and KAREN K. WATSON, court approved  
11 transcribers, certify that the foregoing is a correct  
12 transcript from the official electronic sound recording of the  
13 proceedings in the above-entitled matter, and to the best of  
14 our ability.

15

16 /s/ Liesl Springer

17 LIESL SPRINGER

18

19 /s/ Karen K. Watson

20 KAREN K. WATSON

21 J&J COURT TRANSCRIBERS, INC.

DATE: December 15, 2020

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